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No. 86-1451

In The

Supreme Court of the United States

October Term, 1986

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Petitioner,

vs.

THE UNITED STATES OF AMERICA AND THE SIOUX TRIBE OF INDIANS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

This Reply Brief is filed pursuant to Rule 22.5 of the Rules of the United States Supreme Court and addresses issues presented in the Memorandum For The United States In Opposition.

ARGUMENT

I. THE ISSUES RAISED IN THE PETITION WERE RAISED OR DECIDED BY THE CLAIMS COURT.

The United States asserts that the Federal Circuit refused to address the issues of " 'whether [petitioner] is entitled to withdraw from the case' and 'whether the Claims Court incorrectly construed certain provisions of the 1868 Treaty and 1877 Act,' " on the basis that only the issue of Government offsets could be decided under the 1980 Court of Claims remand to the Claims Court. U.S. Memorandum at 4-5. They also assert that:

> The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.
>
> Petitioner is simply wrong in asserting that the court of appeals was required to address legal issues that were neither raised in nor decided by the Claims Court. This Court routinely declines to decide legal issues in that posture. * * * The court of appeals—which was sitting as an appellate court, not a trial court—did not err by applying that same rule.

U.S. Memorandum at 5.

The record in this case indicates the contrary, however.

A. The issue of whether the Petitioner can be severed from Docket 74 was decided by the Claims Court.

The issue of whether Petitioner can be severed from Docket 74 was addressed by the Claims Court. The court noted that resolutions to withdraw from the case were

passed by some tribes involved, but no formal motions were ever filed. The court nevertheless ruled that "[e]ven if such motions were filed on behalf of the above four reservation tribes, this Court would be forced to deny the motions," since some tribes which make up plaintiff would be "unjustly enriched" and the withdrawing tribes "would be precluded from ever recovering any monetary award based on claims raised in Docket 74." The court concluded that "[o]nly if all the eight reservation tribes making up the plaintiff in this action agreed to move for voluntary dismissal, without monetary compensation, would this Court grant such a motion." *Sioux Tribe v. United States,* 8 Cl.Ct. 80, 86-89 (1985); Petition Appendix at 38-39.

This ruling adversely effects Petitioner and was properly raised, but not addressed, on appeal. Unless this ruling is reversed, Petitioner may never be able to successfully move to withdraw from Docket 74 unless all the tribes that constitute the "plaintiff" agree to join in the motion.

B. The treaty issues were raised in the original petition and should have been decided by the Indian Claims Commission under the Good Faith Effort Test.

The issue of whether the 1877 Act confiscated 1851 Treaty territory outside the Great Sioux Reservation was raised in the original Docket 74 petition.

The original petition alleged that the 1851 Treaty recognized the right and title of the Teton to a large area of land, including the Black Hills. *Sioux Tribe v. United States,* 500 F.2d 458, 478 (Ct.Cl. 1974). The entire petition

"was based on the taking of [Sioux] lands under the Act of 1877."[1] *Id.*, 500 F.2d at 484.

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[1] The original petition held title to three classes of land. Class B was described as follows:

> *Class B.* All of that area lying west of the Missouri River and included in the outer boundaries laid down by the treaty of September 17, 1851, exclusive, however, of the area described as the permanent reservation of the Sioux Tribe of Indians by Article II of the treaty of April 29, 1868. To this area, comprising 25,858,594.95 acres, the plaintiffs had absolute and exclusive right to the undisturbed use and occupation.

Original Petition, Paragraph XV. See *Sioux Tribe v. United States*, 500 F.2d 458, 483 (Ct.Cl. 1974).

In the prayer for relief, plaintiffs requested the following relief:

> XXV
>
> *Recovery Due Plaintiffs*
>
> The plaintiffs say they are entitled to payment for their lands on the basis of fair and honorable dealings.
>
> * * * * * * * * *
>
> Plaintiffs therefore claim from defendant, on information and belief as follows:
>
> * * * * * * * * *
>
> 3. *Unceded Lands.* Payment of at least 50 cents per acre for unceded lands, Class B (outside the 1868 Permanent Reservation but declared to be unceded by the 1868 Treaty)—25,858,594.95 acres—together with interest thereon from February 28, 1877, to the date of settlement of this claim.
>
> * * * * * * * * *
>
> Wherefore, the premises considered, plaintiffs pray:
>
> That this petition be considered by the Indian Claims Commission and be reported to the Congress in favor of the plaintiffs in the amount established by the evidence and as hereinbefore set out.
>
> For such other and further relief as to the Commission may seem just and proper in the premises.

See Sioux Tribe v. United States, supra, 500 F.2d at 485.

In summarizing what the original petition contained, the Court of Claims found as follows:

> In summary the following claims were asserted by the Teton plaintiffs in their original petition:
>
> 1. Claims *only* by the eight Teton Sioux Tribes named above whose names are subscribed to the petition.
>
> 2. Claims *only* for the taking of their property by Act of Congress of February 28, 1877, as follows:
>
> * * * * * * *
>
> (e) For 50 cents per acre for 25,858,594.95 acres of unceded lands (Class B described above) outside of the 1868 permanent reservation, together with interest *from February 28, 1877* to date.
>
> * * * * * * *
>
> 3. *All* of the claims were based on recognized title under the Treaties of 1851 and 1868.
>
> 4. *All* of the claims were made with reference to land *west* and *south* of the Missouri River.

[Emphasis in original]. *Sioux Tribe v. United States, supra,* 500 F.2d at 485 (J. Skelton, concurring in part, dissenting in part).

On November 4, 1960, the Indian Claims Commission granted a motion made by the Sioux plaintiffs to amend the original petition by substituting two separate petitions to be designated as Dockets 74-A and 74-B. *Sioux Tribe v. United States, supra,* 500 F.2d at 477. The amended petition in Docket 74-A asserted that the Sioux relinquished the right to permanently occupy the 1851 Treaty territory in Article 11 of the 1868 Treaty. *Sioux Tribe v. United States, supra,* 500 F.2d at 477. The prayer for

relief requested compensation for the value of the territory and rights ceded to the United States under Article 11 of the Treaty. *Id.* at 177.

The Indian Claims Commission subsequently struck the amended petition in Docket 74-A, however, but directed that the issues to be tried under the original petition would include the land and interests ceded by the Treaty of April 29, 1868. Although counsel for the Sioux plaintiffs argued that this effected the same result as if the amended petition in Docket 74-A had been allowed to stand, and the Government agreed with this view,[2] *Sioux Tribe v. United States, supra,* 500 F.2d at 477 n. 21, the allegations and claims contained in the original petition were still before the Indian Claims Commission. The Indian Claims Commission therefore had a *duty* to examine the 1851 treaty claims under the Good Faith Effort Test. See *Fort Berthold Reservation v. United States,* 390 F.2d 686 (Ct.Cl. 1968); *United States v. Sioux Nation of Indians,* 100 S.Ct. 2716, 2741 (1980) ("[W]e approve the [Court of Claims] formulation of the inquiry as setting a standard that ought to be emulated by courts faced with resolving future cases presenting the question at issue here").

o

[2] As noted on page 15 n. 14 of the Petition, the Oglala Sioux Tribe has never knowingly authorized Docket 74 to proceed on a treaty cession theory. The Tribe authorized the case to be filed only upon the theory that tribal lands outside the Great Sioux Reservation were confiscated by the 1877 Act.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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